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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 21

UNITED STATES OF AMERICA, EX REL. MURRAY BRENSILBER, AND EMANUEL THEBNER, AND MURRAY BRENSILBER AND EMANUEL THEBNER, ON THEIR OWN BEHALF,

Petitioners,

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH AND THEODORE B. DRESCHER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONERS.

Opinion Below.

The district court filed no opinion. The opinion of the circuit court of appeals (R. 267-269) is reported in 131 F. 2d 545.

Jurisdiction.

The judgment of the circuit court of appeals sought to be reviewed was entered on November 23, 1942 (R. 270). Petition for writ of certiorari was filed February 23, 1943, and was granted May 3, 1943 (R. 271). The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether, under a statute which imposes liability upon every person who presents "fraudulent" claims for "payment" by the United States, a cause of action is stated upon allegations that those charged secured their only important competitor either to refrain from bidding on government contracts or to submit inflated bids, entered into an arrangement for participation in the proceeds of such colorable bids if any should be accepted by the United States, and, under the protection of such arrangement, engaged in securing and fulfilling government contracts and seeking and securing payment therefor from the United States.

2. Whether, under a statute which requires only that there shall have been a "fraudulent" scheme and that the parties charged shall have sought "payment" from the United States, a court may properly dismiss a complaint for failure to state a cause of action on the ground that although what was "done was a wrong * * * it was not a 'fraud' unless [the parties charged] represented at some stage of the negotiations [with the United States] that they had not secured an unlawful monopoly of the market"; and whether, assuming that the statute requires the making of affirmative misrepresentations in addition to the underlying fraudulent scheme, such requirement is satisfied by (1) the submission of bids on government orders as though competitive and fair while concealing the collusive arrange-

ment by which competition was eliminated and (2) procuring a competitor either to refrain from bidding or to submit inflated bids in order that the bids of the party charged may seem fair and reasonable and that it may appear that the competitor could not bid successfully for economic reasons.

Statutes Involved.

Revised Statutes, sec. 5438:

> Every person [1] who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or [2] who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or [3] who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim * * * shall be imprisoned at hard labor for not less than one or more than five years, or fined not less than one thousand nor more than five thousand dollars.

Revised Statutes, sec. 3490:

> Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the do-

ing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

Revised Statutes secs. 3491-3493, authorizing *qui tam* proceedings to enforce the liability imposed by R. S. sec. 3490, are printed in the Appendix.

Statement.

This is a *qui tam* action brought pursuant to R. S. §3490 to recover penalties and double damages on account of a fraud upon the United States through collusive bidding, in which the trial court dismissed the complaint for failure to state a cause of action, the Circuit Court of Appeals for the Second Circuit affirmed, and this Court granted certiorari. The essential facts and history of the relevant proceedings, in chronological order, are briefly as follows:

The illegal combination.—On April 28, 1921, Bausch & Lomb entered into a 25-year agreement with Carl Zeiss of Jena, Germany, providing generally for payment of royalties by Bausch & Lomb to Zeiss—stated to be in consideration for patent licenses and technical assistance—on all sales of military optical instruments by Bausch & Lomb (R. 146). Paragraph 3, relating to military optical instruments, contains an arrangement by which Bausch & Lomb agreed not to sell such instruments to countries other than the United States and Carl Zeiss agreed "not to sell such instruments, directly or indirectly to the United States unless the parties have come to an agreement regarding the conditions of sale and the respective territories of distribution" (R. 147). Paragraph 9 provided that the parties "agree to keep the foregoing agreement in strict confidence as regards a third party and to guard silence concerning this agreement also with their own employees as far as this may be practical under the circumstances" (R. 149).

On June 27, 1925, Paragraph 3 of the agreement was amended by adding the following provision (R. 151-152):

> In the case of inquiries, received by Bausch & Lomb from authorities outside of the United States of America, by Carl Zeiss from the authorities of the United States, one party informs the other of the inquiry and is obligated to make the protective offer named by the other party. The increase of the protective offer over the normal price for the corresponding quantity of instruments in question shall not be higher than 20%. Both parties are obligated to treat such inquiries as promptly as possible. If the party, that has made the protective offer should, nevertheless, receive the order, it is obligated to cede in full to the other firm the excess price representing the protection.

A further amendment on October 28, 1925, to add further modifications as to protective offers when made by Bausch & Lomb, left the above-quoted provision in full effect (R. 153-156).

Later, on November 26 and December 24, 1926, this agreement, as modified, was supplanted by a new form of contract, which narrowed the provisions of Paragraph 3 to an agreement for an exclusive patent license (R. 157, 159). However, Paragraph 6 of this new agreement contained the following language (R. 159):

> In the production and sale of *nonmilitary* articles, both parties will remain in unrestricted competition in the World's markets (including North America and Europe) during the existence of this contract. *They shall, however, endeavor to give due consideration to one another's interests as those interests may be disclosed by the joint work in the Military line.* (Emphasis supplied.)

The Government's criminal proceedings.—In March, 1940, the respondents,—i. e., the Bausch & Lomb respondents as

well as Carl Zeiss of Jena, Germany, and Carl Zeiss, Inc.[1] —were indicted on two counts, for conspiracy in violation of the Sherman Anti-trust Act and in violation of section 73 of the Wilson Act (R. 86-109). This indictment charged that, notwithstanding the changes in the form of the supplemented 1921 agreement effectuated by the 1926 agreement, Bausch & Lomb and Zeiss "intended and continued to carry out" the terms of Paragraphs 3 and 9 of the 1921 agreement as supplemented in 1925 (R. 97, 105). Included in the allegations of acts in furtherance of the conspiracy were charges that Zeiss had refused to sell military optical instruments for use within the United States unless Bausch & Lomb consented and Zeiss "on various occasions subsequent to June 27, 1925 has offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb at arbitrary, artificial, unreasonable and non-competitive prices agreed upon by Bausch & Lomb and Zeiss" (R. 98). And the indictment concluded that as a result the respondents "have exacted arbitrary, artificial, unreasonable and non-competitive prices from purchasers of military optical instruments including the Government of the United States" (R. 99). Pleas of *nolo contendere* were entered for all the respondents except Carl Zeiss. The Bausch & Lomb defendants were fined $5,000 on each of the

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[1]Bausch & Lomb and its officer defendants—M. H. Eisenhart, Carl L. Bausch, and Theodore B. Drescher—are hereinafter sometimes referred to as the "Bausch & Lomb respondents".

Carl Zeiss of Jena, a German corporation, though named as a defendant in the indictment and in the subsequent equity suit brought by the United States was not found in the jurisdiction and never became a party to any of the proceedings.

Carl Zeiss, Inc., a New York corporation organized on or about December 11, 1925, and wholly owned, completely dominated, controlled and operated by Carl Zeiss of Jena, Germany, was the instrumentality or agency through which the latter carried on business in the Southern District of New York (R. 87-88).

two counts on May 27, 1940, and Carl Zeiss, Inc. was fined $1,000 on March 5, 1941 (R. 110).

The Government's action for injunction.—On July 8, 1940, the United States filed its complaint for injunction against the Bausch & Lomb defendants relying on the same contracts and again alleging that "notwithstanding [the] change [in 1926] in the form of the April 28, 1921, agreement as supplemented, Bausch & Lomb and Zeiss intended and continued to carry out the terms of Paragraphs 3 and 9 of the April 28, 1921, agreement as supplemented in 1925" (R. 212, 223). On July 9, 1940, a consent decree was entered (R. 243-248) enjoining the defendants, among other things, from conspiring with other manufacturers "to fix or maintain prices, quotations or terms of sale of military optical instruments", "to agree upon the prices which any other manufacturer of military optical instruments shall charge for such instruments", or "to make bids or price quotations on military optical instruments at the request of any other manufacturer of such instruments" (R. 245).

Action by petitioners.—The United States for a subsequent period of 18 months took no steps to recover damages resulting from misrepresentations in connection with purchases made during the continuance of the conspiracy. Finally, on December 17, 1941, petitioners filed their original complaint which alleged that respondents with others had been engaged in a conspiracy in the case of sales made to the United States Government to fix, maintain, and control arbitrary, artificial and unreasonable prices and terms of sale of military optical instruments (R. 1, 3-10). It was mistakenly alleged that the unlawful combination required that *neither* of the parties sell to the United States without the consent of the other and that sales made by *either* of them to the Government would contain a markup of 20% to be paid over to the other party (R. 5-6).

The amended complaint.—Upon motion (R. 13) and affidavits (R. 17, 32, 33, 34), respondents obtained an order to

show cause why the complaint should not be dismissed and summary judgment entered for defendants (R. 11-12). Thereupon, on January 13, 1942, an amended complaint (R. 78-85) was served (R. 50, 61).

Final proceedings in the district court.—The district court thereupon, on January 14, 1942, entered new orders directing petitioners to show cause why an order should not be entered (1) striking the original complaint as sham and frivolous, (2) determining the amended complaint is a nullity and denying leave to file the amended complaint, or (3) dismissing the action and amended complaint for improper venue and for failure to state a cause of action and granting summary judgment (R. 46, 57). These orders also stayed petitioners from taking any further proceedings in the action until final decision upon the motion (R. 48, 59). Affidavits filed in connection with these orders brought before the court all of the records in the earlier government proceedings.[2]

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[2]Counsel for respondents filed new affidavits in connection with the second order to show cause (R. 49, 60). The affidavit of counsel for Bausch & Lomb in support of the second order to show cause (R. 49) asserts that the amended complaint should be dismissed and summary judgment granted on the grounds set forth in an attached order to show cause (R. 52). That order founds the motion for summary judgment on the affidavits annexed to the earlier order to show cause dated January 6, 1942, and the attached affidavit of counsel (R. 47).

The affidavit of Herbert Eisenhart, President of Bausch & Lomb—and the only affidavit which purports to set out facts with respect to the conspiracy—incorporates by reference the Government's indictment and equity complaint (R. 23, 24). The equity complaint by reference (R. 221-223) includes the contract of Bausch & Lomb with Carl Zeiss, Jena, dated April 28, 1921 (R. 228) together with its supplements of June 27, 1925 (R. 233) and October 28, 1925 (R. 235), and the contract of November 26-December 24, 1926 (R. 238). This affidavit upon which the second motion for dismissal and summary judgment is based, is admitted to have brought before the

After hearing argument, the court entered its order that the amended complaint is a nullity and denying petitioners leave to amend the complaint in accordance with the proposed amended complaint on the ground that the amended complaint does not state a cause of action (R. 254-258). The original complaint was ordered dismissed and summary judgment entered for respondents (R. 259-262).

Decision of the circuit court of appeals.—On appeal the circuit court of appeals held (R. 269):

> In the view we take, it is not necessary to decide whether the plaintiffs had the unconditional right under Rule 15 (a) to serve the amended complaint. The judge did indeed deny leave to amend on the ground that the second complaint did not state a cause of action, as to which he was perhaps wrong, taking the pleading as it reads. But in result it made no difference, for the amended complaint like the original was subject to summary dismissal, and it was mere matter of form whether it was accepted and then dismissed, or refused at the outset.

Holding that what respondents did "was a wrong, but it was not a 'fraud' " (R. 268), the circuit court of appeals entered its order for mandate affirming the judgment of the district court (R. 270). The relevant allegations of fact and the reasoning of the court below are set forth in the argument *infra*.

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court the complete records of the Government's anti-trust proceedings (R. 251), which of course includes the bills of particulars to the indictment (R. 112-208).

Petitioners filed affidavits in opposition to the rule (R. 64, 77) and by reference (R. 65) incorporated therein the federal indictment (R. 86), the Government's Bill of Particulars (R. 112, 194)—which included the agreements of Bausch & Lomb with Carl Zeiss of Jena (R. 145, 151, 153, 157)—and also the Government's complaint in equity and the consent decree entered thereon (R. 212, 243).

Specification of Errors.

The circuit court of appeals erred:

1. In holding that the acts of the members in furtherance of, and pursuant to, their unlawful combination to allot all United States Government business to the American corporation involved no representations to the United States upon which to found a charge of fraud in the procuring of contracts with the United States.

2. In failing to hold that the obtaining by an American corporation of the agreements of its principal competitor to abstain from selling military optical instruments to the United States Government clearly involves fraud where such agreement is implemented by the systematic abstention from competitive bidding by such competitor and the making of merely colorable protective bids by such competitor at increased prices fixed by the American corporation.

Summary of Argument.

I. The statute here involved requires pleading and proof only that, (a) with knowledge that they are a part or culmination of a "fraudulent" scheme, (b) the parties charged shall have submitted claims for "payment" by the United States. R. S. §5438. Here the pleadings set forth (a) that respondent Bausch & Lomb and its largest and only serious competitor, Zeiss, undertook to divide the world market for military optical instruments leaving the United States government market to Bausch & Lomb, that when pressed to bid on United States government contracts Zeiss would make inflated "protective offers" and—if any such were accepted by the United States—turn over the inflated portion of such prices to Bausch & Lomb, and (b) that Bausch & Lomb submitted bids and received payments from the United States at the unreasonably high prices so artificially fixed and controlled. The facts so pleaded are sufficient allega-

tions of three kinds of fraud—(1) securing a competitor to refrain from bidding, (2) procuring a competitor to submit inflated bids, and (3) participating secretly in the proceeds of such colorable bids as were accepted by the United States. The courts below, therefore, improperly sanctioned summary judgment for the respondents on the ground of failure to state a cause of action.

II. The first and third clauses of the statute here involved, unlike the second clause, require only that there shall have been a "fraudulent" scheme and that, at some time, the parties charged shall have sought "payment" from the United States as a part or culmination of such scheme. The court below, however, ignored the statute by requiring that respondents must not only be guilty of wrong but, in addition, must "at some stage of the negotiations" with the United States have made affirmative misrepresentations in denial of their own fraud. In so proceeding the court below manifestly misconstrued the statute by adding a new requirement or bar to liability, and thereby emasculated the first and third clauses of the statute. In any event, the facts pleaded indicate that respondents have made the following types of misrepresentations: (1) By submitting bids to the United States while concealing their arrangements with Zeiss, respondents have deceitfully represented that their bids are competitive and fair. (2) Through their co-conspirator or agent, Zeiss, respondents have secured the withholding of bids or the making of inflated and colorable bids and thus have fraudulently made it appear to the contracting officers of the United States (a) that the bids of Bausch & Lomb by comparison were fair and reasonable and (b) that Zeiss was unable for economic reasons to compete in sales of military instruments to the United States. These were affirmative, fraudulent, and false representations and, to the extent that the statute may be deemed to require affirmative representations, satisfy every such requirement.

Argument.

It is clear that, under the Rules of Civil Procedure, petitioners were entitled as of right to file their amended complaint—as the court below acknowledged but found it unnecessary to decide (R. 269).[3] The essential question

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[3]Rule 15 (a), Federal Rules of Civil Procedure, provides: "Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served." In 1 Moore, Federal Practice, p. 428, it is stated: "A motion is not a pleading. It is defined as 'an application to the court for an order'." Since a motion is not a pleading, a motion for summary judgment cannot be a "responsive pleading". Therefore petitioners were entitled to amend as of right.

Moreover, the Rules of Civil Procedure do not include motions in the category of pleadings. Rule 7 (a) provides: "Pleadings. There shall be a complaint and an answer; and there shall be a reply, if the answer contains a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. *No other pleading shall be allowed*, except that the court may order a reply to an answer or a third-party answer." (Emphasis supplied.) Rule 12 (b) also distinguishes between a pleading and a motion. Cf. *United States* v. *Newbury Mfg. Co.*, 123 F. 2d 453, 454 (C. C. A. 1); contra *Triangle Conduit & Cable Co.* v. *National Elec. P. Co.*, 38 F. Supp. 533 (Del.) rev'd on other grounds 125 F. 2d 1008.

In any event, the various affidavits, submitted in connection with the rules to show cause, incorporate by reference all the basic facts and exhibits as set forth in the government proceedings (see note 2 *supra*) and thus supply any omissions and correct any misstatements in petitioners' original complaint. Summary judgment, as is here involved, is rendered on "the pleadings, depositions, and admissions on file, together with the affidavits" (Rule 56 (c), Rules of Civil Procedure). "Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes" (Rule 10 (c), Rules of Civil Procedure).

treated by the courts below was the sufficiency of the amended complaint to state a cause of action (R. 258, 269) and, accordingly, the question here is the same.

The holding of the circuit court of appeals that the amended complaint must be held to state no cause of action because the acts of the respondents under the unlawful agreements involved no fraud is palpably erroneous.[4] The arrangement here involved was simple. Bausch & Lomb and Carl Zeiss of Jena were by far the two largest manufacturers of military optical instruments. To avoid competition with each other and attain the price benefits of a monopoly in the manufacture and sale of military optical instruments, they agreed that Bausch & Lomb should have the exclusive right to sell to the United States Government and that Zeiss should be free of competition from Bausch & Lomb in the sale of such instruments to all other countries. The agreement, so far as Bausch & Lomb was concerned, was aimed directly at the United States Government. The circuit court of appeals concedes that the arrangement between Bausch & Lomb and Zeiss was a "wrong" to the United States, and it cannot be reasonably contended that, to the extent that it resulted in the payment of prices higher than would have been obtained had competition not been thus restrained, the United States was not damaged. This Court has long held that fraud may "be perpetrated by getting the contract at a higher price than otherwise would have been obtained" and that such a con-

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[4]The statement of the court that "the supposed liability arose from the offense for which Bausch & Lomb were indicted and to which they pleaded nolo contendere" is untenable in law (R. 269). The indictment was for conspiracy, not even requiring proof of an overt act. Damage might or might not be involved . In the instant case, the amended complaint relies on a series of claims which were paid by the United States to its damage by reason of the fact that such claims were based upon prices agreed to as a result of fraud chargeable to Bausch & Lomb.

tract results "in defrauding the United States by causing it to pay more * * * than was necessary. *Crawford* v. *United States*, 212 U. S. 183, 192. The court below, however, held that this wrong "was not a 'fraud' unless Bausch & Lomb represented at some stage of the negotiations that they had not secured an unlawful monopoly of the market"; and it held that Bausch & Lomb had made no such representation (R. 268).

I. ACTIONABLE FRAUD IS HERE SUFFICIENTLY ALLEGED BECAUSE IT IS PLEADED THAT BAUSCH & LOMB IS BOTH A GOVERNMENT CONTRACTOR AND HAS PROCURED ITS MOST IMPORTANT COMPETITOR TO REFRAIN FROM BIDDING OR TO SUBMIT INFLATED BIDS.

A fraud upon the United States, actionable under R. S. §§3490-3493 and 5438, is here alleged because it is pleaded that the Bausch & Lomb respondents (a) are in the business of performing government contracts and have submitted bids and bills to, and pursuant to such bids and bills have collected payment from, the United States and (b) at the same time have procured their most important and only serious competitor to refrain from bidding or have caused it to submit inflated bids. Carl Zeiss, Inc., is alleged to have refrained from selling to the United States Government and thereby to have aided the conspiracy (R. 83, 100). The relevant statutes embrace fraud, the pleadings contain the facts, and the decisions affirm such facts as actionable.

The statute.—In *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 539-540, this Court has set forth the interrelations of R. S. §§5438 and 3490-3493. They provide for the collection of double damages and penalties against any who commit acts within one or more of the several clauses of R. S. §5438, 12 Stat. 696. The first clause embraces

> every person who makes * * * or presents * * * for payment or approval * * * any claim upon or against the Government of the United States * * * knowing such claim to be * * * fraudulent.

The third clause embraces

> every person * * * who enters into any agreement, combination, or conspiracy to defraud the Government of the United States * * * by obtaining * * * the payment or allowance of any * * * fraudulent claim.

In essence, therefore, the statute imposes liability—so far as here important—upon those who do two things: (1) submit claims for "payment" by the United States, (2) knowing that such claims are "fraudulent." The statute says no more, so that the statutory words "payment" and "fraudulent" are to be taken in their ordinary significance.

The pleadings.—In accordance with the foregoing two elements of the statute, the pleadings cover both (1) the fraud or fraudulent scheme of the respondents and (2) their submission, with knowledge, of claims for payment by the United States pursuant to, or growing out of, such fraudulent scheme:

(1) In addition to the basic agreements and practices pleaded, whereby Zeiss was either to refrain from bidding upon United States military government orders or to submit inflated bids and turn over a portion of the receipts in case such bids were accepted by the United States government (*supra*, pp. 4-8), the amended complaint alleged that Bausch & Lomb and Carl Zeiss, Jena, Germany from April 28, 1921 and Carl Zeiss, Inc., from its incorporation in 1925 and the individual defendants from the time they became officers or directors of Bausch & Lomb have up until March 29, 1940 been engaged in a conspiracy (a) to divide the world market for military optical instruments, the exclusive territory of Bausch & Lomb to be the United

States and that of Zeiss to be the rest of the world, (b) not to sell in the other's territory without prior consent, and (c) in the case of sales made with such prior consent to fix, maintain, and control arbitrary, artificial, and unreasonable prices and terms of sale[5] (R. 78, 80-81). It further alleged that both Bausch & Lomb and Carl Zeiss, Jena, have delivered military optical instruments to the United States at arbitrary, artificial, unreasonable, and non-competitive prices and that Bausch & Lomb have received payment for such instruments (R. 81-82). It pleaded that Bausch & Lomb at various times submitted to the Government bids for contracts for the manufacture and sale of military optical instruments to be used by the United States (R. 82):

> Such bids were at prices that pretended to be and were represented to be, and which the Government of the United States and its authorized representatives believed to be, the normal, prevailing and competitive prices of such military optical instruments. Such bids, were, in fact, not the normal, prevailing and competitive prices therefor, but were in excess of the normal, prevailing and competitive prices for such military optical instruments.

It was also pleaded that the authorized officers of the United States were without knowledge of the conspiracy and accepted various bids submitted by Bausch & Lomb (R. 82). These allegations set forth the basic fraudulent scheme of respondents, upon which their liability in damages is predicated.

(2) As to the second basic element of the statute, the presentation of claims to the United States for payment, the amended complaint alleged that (R. 83):

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[5]It was also alleged that Bausch & Lomb agreed to pay to Zeiss a royalty on the gross sales price of each instrument sold to the United States regardless of whether such equipment was covered in whole or part by Zeiss patents (R. 81).

> the defendants, other than Carl Zeiss, Inc., * * * have presented for payment and approval to various officers of the * * * United States, bids, claims, invoices, bills, vouchers and statements and accounts against the United States. * * * The defendants knew that such bids, claims, invoices, bills, vouchers, statements and accounts were excessive, false, fictitious and fraudulent by reasons aforesaid, in that said defendants added to the normal, prevailing and competitive prices, an arbitrary amount pursuant to the conspiracy, combination and agreements between the defendants aforesaid, and said claims, bills, statements and accounts were respectively paid and satisfied.

There were thus pleaded both (1) a fraudulent scheme, agreement, combination, or conspiracy relating to government contracts and (2) the consequent presentation of claims for payment by the United States. The one, of course, is inseparable from the other. It will not avail respondents to say that the presentations for payment must be considered alone and without reference to the previously entered combination or agreement. As this Court has lately said:

> This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate * * * The initial fraudulent action and every step thereafter taken pressed ever to the ultimate goal—payment of government money. (*United States ex rel. Marcus* v. *Hess, supra,* pp. 543-544).

The court below was equally specific in the instant case (R. 267):

> If the claimant has once procured a contract [with the United States] by fraud, any claims he may thereafter present [to the United States] are "fraudulent" whether or not they fall within its terms.

See to the same effect the decision of the Ninth Circuit in *Dimmick* v. *United States,* 116 Fed. 825, 828:

> The character of the claim—that is to say, whether * * * honest, or * * fraudulent—must be determined in view of all of the facts and circumstances attending it. If it be originally * * * fraudulently concocted, its presentation for payment with knowledge of the facts must necessarily be fictitious and fraudulent.

Petitioners find no rule, principle, or decision to the contrary.

The sole question here, therefore, is whether the facts pleaded constitute sufficient allegations of fraud independently of the subsequent submittal of vouchers, bills, affidavits, or accounts. The latter are merely acts in consummation of the fraud. They relate the fraud to the United States treasury and are thus an essential element under the statute, but innocence upon their face does not dissipate the underlying fraud.

(3) The affidavits submitted in support of the summary judgment here under review do not alter the state of the pleadings. Such summary judgment is properly entered only if the pleadings and affidavits "show [a] that * * * there is no genuine issue as to any material fact and [b] that the moving party is entitled to a judgment as a matter of law" (Rule 56 (c), Rules of Civil Procedure). The question of law on the pleadings and documentary exhibits heretofore described at length is argued below in showing that the facts so presented are sufficient allegations of fraud and misrepresentation. Respondents' affidavits do not detract from the state of the pleadings as to the allegations of fact, for those affidavits consist of nothing more than general denials, statements contrary to the documents of record, contradictions of the facts pleaded, or immaterial assertions. Both courts below, moreover, have quite obviously treated the issue here as one solely of law.

The only facts alleged by respondents in their affidavits in no way contradict the basic facts replied upon in the amended complaint and appearing in the record before the

court. The affidavit of M. Herbert Eisenhart, President of Bausch & Lomb (R. 17-31), was relied upon as a basis for the application for order to show cause why summary judgment should not be entered on the original complaint (R. 11-12). It was also relied upon as a basis for the application for a similar order on the amended complaint (R. 47, 52). A careful reading of this affidavit discloses that, aside from conclusions of law, the affidavit is directed almost entirely at the mistaken charge in the original complaint that Bausch & Lomb was required to include in its bids to the United States an increase of up to twenty per cent over the regular price. This allegation was corrected in the amended complaint and was not essential to show the fraud relied upon. In any event, the amount by which Bausch & Lomb was, under the conspiracy, enabled to increase its prices to the United States obviously goes only to the question of the amount of damages.[6]

The affidavit first points out that Mr. Isseks in the course of the criminal proceedings stated for the Government that "there is no charge of fraud against the defendants in connection with the acts complained of in the indictment" (R. 24). This statement was of course accurate, because the charge in the indictment was not based on fraud. On the other hand, even if this statement be regarded as a conclusion by Mr. Isseks that respondents had not in fact defrauded the United States, it was merely his individual view of a question of civil liability beyond the scope of his duties and not before the court.

The affidavit alleges that "the 1925 amendment to the 1921 agreement was in terms revoked by the 1926 agreement, and, in any event, it had no possible relation to bids by

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[6]Whether the consideration for the agreement between the conspirators was the payment by Bausch & Lomb of all or part of the purported royalties or merely a reciprocal agreement for the exclusive right to sell to the named purchasers was equally immaterial on the question of fraud *vel non*.

Bausch & Lomb to the United States Government" (R. 27). This statement, of course, merely contradicts the provisions of the agreement itself which was specifically directed at the United States; it also is in conflict with the facts appearing in the bill of particulars (*supra*, pp. 4-8; and *infra*, pp. 32-33).

The affidavit asserts (R. 27-28) that "the price to be charged to the United States Government by Bausch & Lomb on military optical instruments manufactured by it for the Government was decided upon by Bausch & Lomb alone without the participation or consent of any other organization." This statement does not deny that Bausch & Lomb independently and alone, by virtue of the elimination of Zeiss from competition, was able to increase its price to a figure in excess of that which would have been bid in the presence of competition. Whether this excess was to be paid over to Zeiss or retained in toto by Bausch & Lomb was of course irrelevant so far as fraud and injury to the United States was concerned.

The next pertinent statement is that "at no time was there any occasion when the 20% bid provision of the 1925 agreement—which, by its terms, was inapplicable to bids by Bausch & Lomb to the United States—was invoked in any transaction with the Government of the United States, to which Bausch & Lomb was in any way a party" (R. 29). This statement falls far short of categorically negativing the making of "protective offers" by Zeiss. However, if so regarded, it is contradicted by the facts appearing in the bill of particulars (*supra*, p. 33 note 8).

The affiant closes with a sweeping conclusion of law (R. 29-30) that Bausch & Lomb at no time has submitted any claim upon the Government of the United States which was false, fictitious or fraudulent. The circuit court of appeals did not rely on the allegations of this or any other affidavit, and they afford no support for the judgment here. Since the issues in this case were raised by motion for summary judgment, and since the allegations of fact by the respon-

dents—if they may properly be regarded as even controverting the allegations essential to the charge of fraud contained in the amended complaint—are in any event clearly in conflict with the allegations of the complaint and the documents before the court, the affidavits cannot detract from the sufficiency of the facts pleaded by petitioners. *Weisser* v. *Mursam Shoe Corporation*, 127 F. 2d 344, 346.

Fraud on the facts pleaded.—The pleadings, set forth above, state several types of fraud under the uniform decisions of the federal courts. Separate and long adjudicated categories of fraud appear in the allegations that Bausch & Lomb (1) secured its competitor to refrain from bidding on government contracts, (2) procured its competitor to submit inflated bids, and (3) participated in the proceeds of the accepted and inflated bids of its competitor.

(1) Bausch & Lomb has committed a fraud by procuring its competitor to refrain from bidding on military orders for the United States. The original agreement between Bausch & Lomb and Zeiss provided that Zeiss should not sell military optical instruments "directly or indirectly to the United States" without the consent of Bausch & Lomb (R. 147). Though this agreement was later changed in form, the parties still agreed to "endeavor to give due consideration to one another's interests as those interests may be disclosed by the joint work in the military line" (R. 159) and the practice was continued (*supra*, p. 4-8).

Except that here the parties respondent are fewer and larger, the exclusion is precisely the same as that recently condemned as fraudulent, under the statute here involved, by the Circuit Court of Appeals for the Third Circuit and by this Court in *United States ex rel. Marcus* v. *Hess*, *supra*, p. 539. In public affairs at least, securing a party to refrain from bidding has long been recognized as an undoubted fraud. The authorities recognize that where the contractor thwarts the competitive bidding process by conspiracy,

there is no difference in the result to the public body whether the fraud is effectuated by colorable or complimentary bids made by other prospective bidders or by their mere failure to bid. In either case, the government is deprived of the benefits of competition which it would otherwise have had, and the fraud upon the public body as the result of the concealed joinder of interest is of equal vice. *City of Oakland* v. *California Construction Co.*, 15 Cal. (2d) 573, 576, 578 (1940); *Jennings County* v. *Verbarg*, 63 Ind. 107, 111; see *Swan* v. *Chorpenning*, 20 Cal. 182 (1862). As this Court said in *McMullen* v. *Hoffman*, 174 U. S. 639, 651:

> Upon general principles it must be apparent that biddings for contracts for public works cannot be surrounded with too many precautions for the purpose of obtaining perfectly fair and *bona fide* bids. * * * Public policy requires that officers of such [municipal] corporations, acting in the interest of others, and not using the sharp eye of a practical man engaged in the conduct of his own business, and not controlled by the powerful motive of self-interest, should, so far as possible and for the sake of the public whom they represent, be protected from the dangers arising out of a concealed combination and from fictitious bids.

Thus, when Zeiss, pursuant to the agreement, refrained from bidding and Bausch & Lomb so obtained government contracts, such contracts were obtained by fraud.

(2) Bausch & Lomb has committed a fraud by procuring its competitor to submit inflated bids or "protective offers" to the United States. Paragraph 3 of the agreement with Zeiss as implemented in 1925 provided that "in the case of inquiries * * * received * * * by Carl Zeiss from the authorities of the United States" it would inform Bausch & Lomb, be obligated to make "the protective offer named by" the latter up to 20% above normal prices, and if it secured the contract pay Bausch & Lomb "the excess price representing the protection" (R. 151-152). Though the

agreement was purged of this express provision, the practice continued (*supra*, p. 4-8). As in other collusive bidding cases, the reason for this arrangement was simply that, if competitors refused to bid, suspicion of collusion would be aroused so that deceptive and colorable bids were substituted as occasion required.

Here again, except that the parties are fewer but larger, the practice is precisely the same as that condemned, under the statute here involved, by the Circuit Court of Appeals for the Third Circuit and by this Court only recently in *United States ex rel. Marcus* v. *Hess, supra*, p. 539. By securing such inflated "protective" offers, Bausch & Lomb was enabled to secure higher compensation on its own bids. It was, in effect, a form of "puffing" long recognized as fraud by this Court. In *Veazie* v. *Williams*, 8 How. (49 U. S.) 134, there was involved the making of fictitious bids by an agent of the seller and this Court said (pp. 149-150, 153-154):

> The bill asked the rescission of a sale * * * on the alleged ground of imposition in the sale by means of puffing or by-bidding, so as to advance the price * * * The relief here * * * is sought for a fraud practiced in augmenting the price; or, in other words, for taking false steps to enhance it * * *
>
> A fraud was evidently perpetrated * * * By-bidding or puffing by the owner, or caused by the owner, or ratified by him, has often been held to be a fraud * * * The by-bidding deceives, and involves a falsehood, and is, therefore, bad. It violates, too, a leading condition of the contract of sales at auction, which is that the article shall be knocked off to the highest bidder, without puffing.

In *McMullen* v. *Hoffman*, 174 U. S. 639, 652-653, this Court dealt with collusive bidding as such:

> In this case there is more even than concealment. There is the active fraud in putting in of these, in substance, fictitious bids, in their different names, but in truth

> forming no competitive bids, and put in for the purpose already stated. It is not too much to say that the most perfect good faith is called for on the part of bidders at these public lettings, so far as concerns their position relating to the bids put in by them or in their interest. The making of fictitious bids under the circumstances detailed herein is in its essence an illegal and most improper act; indeed, it is a plain fraud, perpetrated in the effort to obtain the desired result.

No subsequent decision of this or any other federal court departs from the salutary principles thus laid down. For a statement of the similar rule in state courts see *Regan* v. *Babcock*, 188 Minn. 192, 200.

(3) Bausch & Lomb departed from the usual collusive bidding scheme by arranging to receive from Zeiss the "excess" or "protection" added by Zeiss to orders for the United States (R. 151-152, and pp. 4-8 *supra*). It is pleaded that Zeiss sold military optical instruments under this arrangement (R. 81-83, 188-192). Thus respondents have not only procured inflated bids to be made to the United States but, as undisclosed principals, have participated in the proceeds of such bids accepted by the United States. It was thus possible for Bausch & Lomb not only to "chill" the buyer by procuring Zeiss to make unduly high bids but, by its agreement, receive part of the price paid by the United States as to any such bids which might have been accepted nevertheless. It also increased the deceit, for it made it possible for Bausch & Lomb to submit even higher bids, permit Zeiss to receive the orders, and thus allay all suspicion while pocketing the "excess * * * protection."

Such collusive combining or sharing in the proceeds of collusive bids has long and uniformly been condemned as a fraud. This Court has held that, where two bidders on public contracts agree that the successful one will share in the proceeds of any contract received,

> The illegal character of the agreement is founded * * * upon the fact of the commission of a fraud by the parties in combining their interests and concealing the same, and in submitting different bids as if they were bona fide, when they knew that one of them was so much higher than the other that it could not be honestly accepted, and when they put it in for the sake of keeping up the form and of strengthening the idea of a competition which did not in fact exist. (*McMullen* v. *Hoffman*, 174 U. S. 639, 649).

The same rule is applied in other federal courts with respect to both private and public contracts. *Pittsburgh D. & C. Co.* v. *Monongahela & W. D. Co.*, 139 Fed. 780; *In re Salmon*, 145 Fed. 649, aff'd 150 Fed. 279. Thus, by participating in the proceeds of the collusive bidding, respondents have committed a fraud.

II. SO LONG AS THE UNITED STATES IS CHEATED, UNDER THE STATUTE IT IS IMMATERIAL THAT RESPONDENTS HAVE NOT MADE AFFIRMATIVE MISREPRESENTATIONS; BUT, IN ANY EVENT, AFFIRMATIVE MISREPRESENTATIONS WERE MADE AND ARE HERE PLEADED.

The court below was apparently of the view that fraud meant deceit, that deceit meant the making of representations and that—since no representations on the subject were made affirmatively by Bausch & Lomb—there could therefore be no fraud. But the statute does not require that affirmative representations must be made before liability can attach, and the making of collusive bids as here alleged is in itself held to be sufficient representation to conform to the concept of fraud or deceit. Moreover, the object of the statute here involved is not to be thwarted by nice distinctions derived from the common law on fraudulent representations for, as this Court has said, the purpose

of the statute as explained in the Senate on its adoption "was to provide protection against those who would 'cheat the United States.' " *United States ex rel. Marcus* v. *Hess, supra*, p. 544.

The decision below.—The circuit court of appeals held that, under the statutes here involved, Bausch & Lomb was guilty of a "wrong" but not of fraud" (R. 268):

> Although by hypothesis it would be enough that a claimant secured his contract by deceit, deceit is a *sine qua non* * * *
>
> The contracts between Bausch & Lomb and Carl Zeiss of Jena * * * unlawfully gave Bausch & Lomb an advantage * * *
>
> That was a wrong, but it was not a "fraud" unless Bausch & Lomb represented at some stage of the negotiations that they had not secured an unlawful monopoly of the market.

In short, the court holds that the respondents must not only be guilty of fraud but must "at some stage of the negotiations" have denied being guilty. But there is nothing in the relevant clauses of the statute which requires any representation whatever. As set forth in Point I, *supra*, the uniform decisions of the federal courts require only that there shall have been a fraudulent plan and that, pursuant thereto, money shall have been secured or sought from the United States.

The court below may have been misled by failure to distinguish the several very different clauses in the statute. The first clause relates to the individual presentation of any "fraudulent" claim for "payment" by the United States. The third clause brings in those who do so by "agreement, combination, or conspiracy." It is under these clauses of R. S. §5438 that the present complaint is presented and they require no representations whatever but merely the seeking of "payment" from the United

States. In contrast, the second clause, here inapplicable, relates to "any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition"; and this Court has recently distinguished it from the first and third clauses. *United States ex rel. Marcus* v. *Hess, supra,* p. 540 n. 2. Indeed, the very fact that Congress has seen fit to insert a special clause—the second—relating to misrepresentations in papers submitted by parties seeking payments from the United States emphasizes the omission of any requirement of representations, false or otherwise, under the first and third clauses.

The court below has made it quite apparent that it felt it a duty to view the statute with jaundiced eye. It erected a distinction between "wrong" and "fraud." It viewed the statute as "drastically penal", to be "strictly construed", and a perpetuation of a form of action "odious and happily nearly obsolete"; and it thus concluded that the proceeding here involved "is of precisely the sort which a motion for summary judgment was intended to nip in the bud" (R. 268-269).

This Court has recently rejected the similar decision in another circuit:

> We cannot accept either the interpretive approach or the actual decision of the court below. * * *
>
> Congress has power to choose this method to protect the government from burdens fraudulently imposed upon it; to nullify the criminal statute because of dislike of the independent informer sections would be to exercise a veto power which is not ours. Sound rules of statutory interpretation exist to discover and not to direct the Congressional will. * * * We must give [the statute] the fair meaning of its intendment. (*United States ex rel. Marcus v. Hess, supra,* pp. 540-542.)

There, technical difficulties existed because municipal corporations were interposed between the United States and

the contractor-claimants. Here the contractor is in direct contact with the Government which he is charged with defrauding. In the *Hess* case the difficulty was in spelling out the presentation of any claim to the United States for payment, since the defendants had presented their claims for payment only to the intermediate municipalities and in fact had no legal claims upon the United States. It was therefore necessary for this Court to consider "the exact nature of respondents' relation to the government" of the United States and to show that the defendants had actually presented other papers and made representations to the United States or for the approval of officials of the United States. (*Id.* pp. 542-544). The instant case contains no such complication. Here there is a fraudulent scheme followed by collection of moneys from the United States directly.

Manifestly, the court below has wrongly interpreted the statute. It has gone far toward nullifying it, for it holds that there must not only be fraud or a "wrong" but that the accused must have been asked and must have deceitfully denied the particular type of fraud involved. It emasculates the first and third clauses of the statute, leaving only the second—and this despite the fact that the first and third clauses are broader and more likely to catch carefully planned fraudulent schemes. To the extent that deceitful representations may be required, moreover, they are here pleaded as set forth next below.

The representations pleaded.—Assuming that, before anyone can be held liable under R. S. §5438, he must not only have entered into a fraudulent scheme but must have made representations denying such scheme, the facts here pleaded amply demonstrate that respondents made such misrepresentations. Bausch & Lomb not only made such misrepresentations directly but also through its co-conspirator or agent Zeiss.

(1) The court below was of the opinion that respondents had made no misrepresentations to the United States (R. 268):

> A bidder who bids for a contract makes no representation, express or implied, as to the reasons which have led him or enabled him to put in his bid. He does indeed represent that he can perform, but he does not represent that there is an open market, or that his bid is "normal" or "reasonable", or "competitive." If he has been guilty of unlawful conduct in eliminating competitors, he can be called to account as Bausch & Lomb have been [by criminal proceedings and antitrust injunctions], but not because by bidding he has said said anything about competition.

But that statement, assuming it to be proper as to unconcealed conditions, does not fit this case. *For here the bidder has himself carefully rigged the market and then submitted his bids knowing that he had eliminated all serious competition by his own act and had carefully concealed it from the government-buyer.* As this Court has said:

> The vice which is so frequently detected in contracts and agreements [in which parties combine or collude] lies in the fact of secrecy, concealment and deception; the one applicant, though apparently antagonizing the other, is really supporting the latter's application, and the public authorities are misled by statements and representations coming from a supposed adverse but in fact friendly source. (*Hyer* v. *Richmond Traction Company*, 168 U. S. 471, 477.)

So in *United States* v. *Amster*, 273 Fed. 532, 533, the court held that the significant element was the submission of bids

> under the guise of honest competition, coupled with the agreement of the person in charge of the bids to keep silent as to the falsity or fraudulent character of the bids themselves.

The court below has obviously failed to take into account the element and vice of secrecy in this case.

That every participant in a collusive bidding scheme commits a fraudulent act is the implicit and basic assumption of all the cases including the recent decision in *United States ex rel. Marcus* v. *Hess, supra,* p. 539 and n. 1. Every such participant thus submits a bid and, in the words of the statute, later submits claims for payment "knowing such * * * to be * * * fraudulent." This Court has, in so many words, held that a collusive bid is an affirmative misrepresentation:

> A bid thus made amounts to a representation that the sum bid is not in truth an unreasonable or too great a sum for the work to be done. * * * A committee receiving such a bid and assuming it to be a *bona fide* bid would naturally regard it as a representation that the work to be done, with a fair profit, would, in the opinion of the bidder, cost the amount of the bid. Hence it would almost certainly tend to the belief that the lower bid was not an unreasonably high one, and that it would be unnecessary and improper to reject all the bids and advertise for a new letting. (*McMullen* v. *Hoffman,* 174 U. S. 639, 647.)

The Court went on to say that collusive bidding, or rigged bidding, is "active fraud" and the bids so submitted "fictitious * * * forming no competitive bids" (pp. 652-653).[7] The court below, therefore, has not only ignored the facts but also the long-settled rule laid down by this Court.

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[7]It has also been held that a collusive sale is a misrepresentation to the tax authorities, since government officers are entitled to take the sale itself as a "representation that the sale was made in good faith, and without any secret oral understanding between the parties." *Reinstine* v. *Rosenfield,* 111 F. 2d 892, 895.

(2) Not only has Bausch & Lomb directly made fraudulent representations by submitting collusive bids and then, after receiving contracts, submitting claims for payment with knowledge that it had secured the contracts or inflated the price through such fraud, but it is responsible for the misrepresentations it has caused Zeiss to make for the benefit of Bausch & Lomb. In civil, as well as in the criminal law, each member of the conspiracy is constituted the agent of all and every act and declaration in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all. *Connecticut Mut. Life Ins. Co.* v. *Hillmon*, 188 U. S. 208, 218; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 249. This Court, moreover, has laid it down as a rule of agency in the case of bidding:

> The agent is bound to disclose all and to act as the principal is when present, and selling. * * * A principal so acting in person cannot be justified in asserting what is false, and by which another is injured. * * * What the vendor may not do in person, or may not employ others to do in his absence,—that is, make by-bids to enhance the price,—his agent * * * cannot rightfully do. *Veazie* v. *Williams*, 8 How. (49 U. S.) 134, 156-157.)

Whether Zeiss is regarded as a co-conspirator or simple agent, the result is the same in that Bausch & Lomb is responsible.

Here, pursuant to the arrangement between them, Zeiss either refrained from bidding or made colorable or "protective" and inflated bids at the instance of Bausch & Lomb. The elimination of Zeiss from competition for United States Government business was effectuated by the following terms of the agreement (R. 151-152, 153-154):

> Carl Zeiss obligates itself not to sell such [military] instruments, directly or indirectly, to the United States, excepting under the following conditions:

> In the case of inquiries, received * * * by Carl Zeiss from the authorities of the United States, one party informs the other of the inquiry and is obligated to make the protective offer named by the other party. The increase of the protective offer over the normal price for the corresponding quantity of instruments in question shall not be higher than 20%. * * * If the party, that has made the protective offer should, nevertheless, receive the order, it is obligated to cede in full to the other firm the excess price representing the protection.

It thus appears that the conspiracy contemplated that ordinarily Zeiss should make no offers or bids to the United States. However, arbitrary refusal by Zeiss to bid or quote prices on invitation might give rise to suspicion of a secret agreement between the companies. Hence it was provided that upon invitation to bid Zeiss should make a bid or offer, not bona fide, but at a higher figure named by Bausch & Lomb. Indeed, both the indictment and the complaint in equity alleged that on various occasions subsequent to June 27, 1925, Zeiss has offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb at arbitrary, artificial, unreasonable and non-competitive prices agreed upon by Bausch & Lomb and Zeiss (R. 98, 224).[8] It clearly appears that as late as March,

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[8]The continuation of the unlawful agreement expressed in the 1925 modifications of the 1921 contract despite its elimination in form from the 1926 contract is also apparent from the instances cited in the Government's bill of particulars to show that Bausch & Lomb has continued to refuse to sell or to quote prices on military optical instruments for use outside the United States unless Zeiss consented to such sales (R. 97, 131-132). (In 1935 Bausch & Lomb refused contracts with Great Britain and France for $1,500,000 worth of military optical instruments. See Borkin, Germany's Master Plan (1943), pp. 285-286.) It also appears from the bill of particulars that Bausch & Lomb has in other instances sold military optical instruments for use outside the United States

1928, long after the purported repudiation of the unlawful agreement, Zeiss, on inquiry from the United States naval attache in Germany, quoted a price on periscopes only after obtaining the consent of Bausch & Lomb to a figure which included ten per cent. payable to Bausch & Lomb (see Exhibit U, R. 188-192). It is, therefore, apparent that such of the facts as may be said to have been before the court by virtue of the references to the indictment and complaint

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only after first obtaining the consent of Zeiss as to the sale and the price, the sale in each case being made at an arbitrary, artificial, unreasonable and non-competitive price agreed upon with Zeiss (R. 97, 133-136). Exhibits G and H. (R. 162-167) referred to in the bill of particulars at R. 134 translate as follows:

Exhibit G: "The Argentine Naval Commission of this place is interested in buying from one to six altitude meters of 4 meter (base) in accordance with U. S. army specifications, depending on the number they will buy. We intend to ask from $26,000 to $22,000 per piece. Please cable if you are in agreement with this."

Exhibit H: "As an exception, we agree to the offer at the price mentioned."

Exhibit G1: "Russia invites offer for altitude meter of 4 meter (base). We propose to offer one instrument at $25,000; 3 instruments at $24,000 each. Cable whether agree."

Exhibit H1: "We agree to the prices of the 4 meter altitude meters for Russia."

The absence in this correspondence of any reference to the amount of the increase payable over to Zeiss on these sales may be explained by the fact that the supplemental contracts of 1925 state: "The increase of the protective offer over the normal price for the corresponding quantity of instruments in question shall not be higher than 20%" (R. 152, 154). "Normal price" apparently was "the normal price fixed by the firm of Carl Zeiss" (R. 155). The amount of the arbitrary loading of prices in these transactions, therefore, was probably determinable by reference to normal price lists fixed by Carl Zeiss.

show conclusively that Zeiss made bids to the United States in furtherance of the conspiracy with Bausch & Lomb. Since these bids were intended to be, and obviously were, misrepresentations in furtherance of the conspiracy, they are chargeable to respondent Bausch & Lomb.

When Zeiss submitted bids, they were of course false and fraudulent in that they were made on behalf of an undisclosed party, Bausch & Lomb. But the fraudulent effect went deeper than the mere deceit as to the undisclosed principal or unjust enrichment as to the super-charge. The "protective" and inflated offers of Zeiss had two results: (a) They made it appear that the lower Bausch & Lomb bids were fair and reasonable both in individual cases and over the years and (b) they were plain representations that Zeiss was unable for economic reasons to compete in sales of military instruments to the United States. When Zeiss failed to bid at all, by its inaction the second of these was similarly brought home to the contracting officers of the Government of the United States. Each of these falls within recognized categories of fraud and misrepresentation:

(a) Whenever, upon inquiry, Zeiss made a bid or quoted a price to the United States, such bid was not bona fide but colorable only. There was in this a clearly fraudulent misrepresentation in that the contracting officers of the United States were left with the impression that the amount of the bid submitted by Zeiss represented that company's judgment that the sum so named was not unreasonable. Bausch & Lomb could then safely submit high bids, so long as they were below the inflated "protective" offers of Zeiss; and the complaint here alleges that bids by Bausch & Lomb "were at prices that pretended to be and were represented to be, and which the government of the United States and its authorized representatives believed to be the normal, prevailing and competitive prices" (R. 82). The fraudulent misrepresentation and effect in inducing the belief that the bids of Bausch & Lomb were not unreasonably high is

obvious and well-recognized. *McMullen* v. *Hoffman, supra,* p. 647; *United States ex rel. Marcus* v. *Hess, supra,* pp. 542 *et seq.; In re Salmon, supra,* 145 Fed. at 652; see *Hyer* v. *Richmond Traction Company, supra,* p. 477. The holding of the court below that there is no allegation of fraudulent misrepresentation by Bausch & Lomb is therefore in conflict with these decisions.

(b) Zeiss was not merely bound negatively to refrain from selling to the United States. Here it was part of the design and plan that the illegal arrangement be affirmatively concealed from the United States by protective bids and, if pressed, by what would amount to protective sales. In furtherance of the expressed purpose of concealment (R. 149), the bids submitted by Zeiss upon inquiries from the United States amounted to representations not only that they were bona fide but, because under the conspiracy they were required to be up to twenty per cent higher than the normal price, they also amounted to a series of continuing misrepresentations that in truth, in the sale of military instruments in the United States, Zeiss was unable to compete with Bausch & Lomb. The natural and intended tendency then was to suppress the truth and avoid investigations by United States officials which might have earlier disclosed the illegal conspiracy. By the uniformly higher Zeiss bids submitted over a long period of time, the Government officials were thus led to assume that in instances where Zeiss failed to submit a bid it was not because of conspiracy but because of inability to quote competitive prices through economic reasons.

The tendency of this misrepresentation to mislead, through what might be called a course of conduct, was plainly vicious in that it also indicated that the Bausch & Lomb bids were probably fair and reasonable:

> One who deals with another in a business transaction or induces another to deal with a third person knowing that the other is relying upon the maker's misrepre-

> sentation previously made to induce the other to act in another and earlier transaction is subject to the same liability as though the maker had repeated the representation for the purpose of influencing the recipient's conduct in the later transaction. (3 Restatement, Torts, sec. 535).

Fraud may be committed by the suppression of truth as well as by the suggestion of falsehood. *Copper Process Co.* v. *Chicago Bonding & Ins. Co.*, 262 Fed. 66, 73; Benjamin, Sales (7th ed.) p. 462.

> The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff. (*Stewart* v. *Wyoming Ranche Co.*, 128 U. S. 383, 388.)

It is, therefore, submitted that within the meaning of R. S. §5438 Bausch & Lomb has made misrepresentations through Carl Zeiss which at least aided in concealing the existence of the combination and in preserving a non-competitive market for Bausch & Lomb. *Tooker* v. *Alston*, 159 Fed. 599, 603.

Conclusion.

The question here involved is not merely of interest to the litigants, but of general importance. It is respectfully submitted that the decision below should be reversed.

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September, 1943.

APPENDIX.

REVISED STATUTES.

Sec. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

Sec. 3491. The several district courts of the United States, the Supreme Court of the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

Sec. 3492. It shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section thirty-four hundred and ninety by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

Sec. 3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States.